v. *Poh Bar Chian.*[6] Counsel for the defendant, however, suggests a figure of $3,750 based on *Muslim bin Arip* v. *Gue Kee Peng*[7] where $1,500 was awarded for loss of two teeth. Under this item, I take into consideration residual disabilities arising from the loss of the five teeth. As a result of these injuries, the condition of the remaining teeth is poor. The trauma has resulted in the lower teeth $\frac{21}{45}$ | $\frac{1245}{}$ becoming non-vital teeth. These teeth are the current cause of his complaints that several teeth being sensitive to hot and cold water. I have taken into account that two of the lower teeth $\frac{45}{}$ can be cured by endodontic treatment, failing which apisectomy (surgical treatment) is recommended at a total cost of $400. Having regard to all these factors, I am of the view a figure of $5,000 would be reasonable.

Adding the assessment of all these five injuries together, a total sum of $25,000 is obtained. Since all the three fractures and the loss of teeth are interconnected, there is considerable overlapping in this case. A sum of $6,000 should therefore be deducted, leaving a figure of $19,000 which, I think, is fair and reasonable and not out of line with most of the awards given for similar injuries.

Accordingly, I enter judgment for the plaintiff in the sum of $19,000 as general damages and costs, and I also order interest to be paid at 6% per annum on the general damages from date of service of writ to date of judgment.

*Claim allowed.*

Solicitors: *R.K. Nathan; Shearn, Delamore & Co.*

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## WIGGINS TEAPE (M) SDN. BHD. v. BAHAGIA TRADING SDN. BHD.; THE EAST ASIATIC CO. LTD. & ORS. AS OBJECTORS

**[A.C.J. (Vohrah J.) November 10, 1979]**

**[Kuala Lumpur — Application for Execution No. 39 of 1977]**

*Land Law — Land charged — Machinery affixed to land — Machine still on hire-purchase — Whether machinery fixture.*

*Charge — Priority — Land charged — Machine affixed to land — Machine still on hire-purchase — Chargee having prior claim over owner of machine.*

This was an appeal from the Senior Assistant Registrar's decision that an offset printing machine be released to the second objectors, MIMB, instead of the first objectors, EAC, after an enquiry on an interpleader summons arising out of the plaintiffs' application for a writ of execution against the defendants upon a judgment in default of defence. EAC claimed to be the owners of the said machine on the basis of a hire-purchase agreement under which a balance of $57,443.19 was still unpaid. MIMB, however, claimed that the machine which was affixed to the floor of the premises by bolts was a fixture and formed part of the land of which they were the chargees.

**Held,** dismissing the appeal: the principles relating to what constitutes a fixture must be the same whether they relate to land which is mortgaged or to land which is charged. In the result, the Senior Assistant Registrar was right in deciding that MIMB had a prior claim as against EAC to the machine.

*Cases referred to:-*

(1) *The Shell Company of the Federation of Malaya Ltd.* v. *Commissioner of the Federal Capital of Kuala Lumpur* [1964] M.L.J. 302.

(2) *Holland* v. *Hodgson* L.R. 7 C.P. 328, 335.

(3) *Reynolds* v. *Asbhy & Son* [1904] A.C. 466. H.L.

APPLICATION FOR EXECUTION.

*Wong Soon Foh* for the first objector.

*C. Dass* for the second objector.

*Cur. Adv. Vult.*

**Vohrah J.:** This is an appeal from the decision of the Senior Assistant Registrar ordering that an original Heidelberg offset printing machine (hereinafter referred to as "the machine") be released to the second objectors, Malaysian International Merchant Bankers (MIMB), instead of the first objectors, The East Asiatic Co. Ltd. (EAC), after an enquiry on an interpleader summons (Enclosure 21) arising out of the plaintiffs' application for a writ of execution (Enclosure 2) against the defendants upon a judgment in default of defence.

EAC claim to be the owners of the machine on the basis of a hire-purchase agreement executed on August 24, 1974 (Exhibit LTOI of Enclosure 29) under which, out of a total sum of $289,203.19, a sum of $57,443.19 was still owing to them from the defendants and in consequence of this balance sum being unpaid they claim that they still retain the ownership of the machine. MIMB, however, contend that since the whole of the premises of the defendants was charged to them by a charge document dated March 31, 1976 and duly registered on April 7, 1977 the machine which is affixed to the floor and ground of the said premises by bolts is a fixture and forms part of the land and has accordingly passed as security to them along with the premises giving them priority as legal mortgagees.

The first question I have to consider is whether the machine was transferred by EAC to the defendants as a result of an outright sale in pursuance of the sale agreement dated July 18, 1974 (Exhibit 'B' of Enclosure 57) or of the hire-purchase agreement dated August 24, 1974 (Exhibit 'A' of Enclosure 58). From the evidence of the manager of the printing department of EAC, who was the deponent of two affidavits affirmed on May 25, 1977 (Enclosure 29) and on February 16, 1978 (Enclosure 58) and who was called to the witness stand under the provisions of Order 38 rule 1, I am satisfied that the defendants' rights to the machine are derived from the hire-purchase agreement. That being the case the next and decisive question I have to consider is whether or not the machine has become affixed to the land having regard to the existence of the hire-purchase agreement on the one hand and that of the charge on the other.

It is not disputed that the machine is affixed by bolts to the floor and ground of the premises at Nos. 36 and 38 Jalan Ampang, Kuala Lumpur occupied by the defendants and comprised in land held under Lot Nos. 5584 and 5585. Nor is it disputed that all this land has been charged to MIMB as security for a loan by way of a charge document dated March 31, 1976 and registered on April 7, 1977.

It was contended by counsel for EAC that because of the subsistence of the hire-purchase agreement the defendants are not the owners of the machine and that being the case they cannot pass a better title than they actually possess. Further as the chargor of the land is one Ibrahim bin Medan and as no evidence has been furnished to disclose his relationship with the defendants this non-disclosure brings the case within the exception that what is annexed to the land is not necessarily affixed to it. Counsel's argument, as I understand it, is that by virtue of the hire-purchase agreement the machine cannot be treated as a fixture and continues to be a chattel and that in any case since what has been charged to MIMB is not the defendants' property as such but that of Ibrahim bin Medan MIMB cannot acquire what does not belong to the defendants. In this particular case I do not think it is relevant to consider who the actual chargor of the above-mentioned land is. What is important is that the land as such has been legally charged to MIMB and MIMB accordingly has all the rights of the chargee as stipulated in the charge document. The only point I have to decide is whether the machine forms part of the land held under the charge by acquiring the character of a fixture. That land comprises fixtures is clear from the definition of "land" in section 5 of the National Land Code which includes "all things attached to the earth or permanently fastened to any thing attached to the earth, whether on or below the surface." That the English law relating to fixtures applies to Malaysia is clear from the judgment of Ong J. (as he then was) in *The Shell Company of the Federation of Malaya Ltd.* v. *Commissioner of the Federal Capital of Kuala Lumpur.*[1] This case also quotes with approval a passage of Blackburn J. delivered in *Holland* v. *Hodgson*[2] as follows: —

"Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

The machine, as has been stated before, is affixed to the floor and ground of the defendants' premises by bolts and these premises were comprised in the land charged to MIMB which had no notice or reason to believe that the fixtures thereon did not belong to the defendants or that there were prior encumbrances. In the case of *Reynolds* v. *Ashby & Son,*[3] the House of Lords considered the character of machines supplied by their owner to the lessee of a factory on hire-purchase terms. The machines were affixed to concrete beds in the floor of the factory by bolts and nuts and could have been removed without injury to the buildings or the beds. The lessee made default in payment and the owner brought an action to recover the machines or their value from a mortgagee of the premises who had taken possession. It was held that the machines had been so affixed as to pass by the mortgage to the mortgagee. Lord Lindley at page 473 of the judgment stated: —

"There is a long series of decisions of the highest authority shewing conclusively that as between a mortgagor and a mortgagee machines, fixed as these were to land mortgaged, pass to the mortgagee as part of the land."

Although the point was made by the counsel for EAC that this and other authorities referred to by counsel for MIMB relate to a mortgage as distinct from a charge I take the view that the principles relating to what constitutes a fixture must be the same whether they relate to land which is mortgaged or to land which is charged. In the result I am of the view that the Senior Assistant Registrar was right in deciding that MIMB had a prior claim as against EAC to the machine.

The appeal is accordingly dismissed with costs.

*Appeal dismissed.*

Solicitors: *Chooi & Co.; Shook Lin & Bok.*

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## TAN HOE WATT v. PUBLIC PROSECUTOR

[A.Cr.J. (Mohamed Zahir J.) June 23 & November 25, 1979]
[Kota Bharu — Criminal Appeal No. 7 of 1977]

*Criminal Law and Procedure — Whether Magistrate has discretion to take cognizance of offence on complaint or whether it is mandatory on his part to take such cognizance — Procedure Magistrate should follow where there is a complaint under Criminal Procedure Code (F.M.S. Cap. 6) s. 133.*

In this case the appellant appealed against the decision of the learned President Sessions Court, Kota Bharu as to the part in which the learned President directed the appellant to be accompanied by his counsel to lodge a Police report to the police regarding complaints of assault and criminal intimidation instead of examining the appellant under section 133 of the Criminal Procedure Code. The issue to be decided in this case was whether the President had the discretion to take cognizance of an offence on complaint or whether it was mandatory on his part to take such cognizance.

**Held:** (1) a Magistrate is not bound under the law immediately upon a complaint either orally or in writing by any complainant to proceed to take cognizance of the complaint;

(2) before it can be said that a Magistrate had taken cognizance of an offence under section 133 he must have applied his mind to the offence for the purpose of proceeding with the matter;

(3) in this case the President was not bound to examine the complainant on oath unless he first had taken cognizance of the offence complained of;

(4) in such cases the Magistrate should adopt the following procedure: (a) if the complaint is made in writing then proceed to take cognizance if warranted and proceed as under sections 136 and 137 of the Criminal Procedure Code; (b) if the complainant makes an oral complaint either in open court or in chambers, then if the Magistrate is not having other important or urgent matter then proceed to hear the complaint and take cognizance if needs be. Otherwise request the complainant to make a written complaint and thereafter proceed as under (a) above; (c) if the oral complaint is made by a person who is being produced before the Magistrate for remand or for an extension of remand, where there is difficulty in filing a written complaint and where there is allegation of police assault, then the Magistrate should proceed to hear the complaint straight-away if he is free and if he is not free then fix another earliest available date to hear the complaint. The Magistrate may advise the complainant to lodge a police report if he has not done so and order that the complainant be medically examined if there is an allegation of assault. If there is any difficulty of getting an early date of hearing, the Magistrate should consult the President Sessions Court with a view of getting another Magistrate to hear the complaint; (d) in a case where there is allegation of police assault connected with a cautioned statement made by the com-